PUNCA KLASIK SDN. BHD.

v.

SEOK KIM LEOW

HIGH COURT MALAYA, JOHOR BAHRU
DATO' ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-385-1994]
6 APRIL 1996

CIVIL PROCEDURE: *Time - Extension of time - Whether to allow - Whether other party prejudiced - Whether other party can be compensated by costs - Whether there must always be cogent material to satisfactorily explain delay - Rules of the High Court 1980, O. 3 r. 5(1).*

CIVIL PROCEDURE: *Rules of Court - Rules of practice - Whether must be rigorously observed - Whether procedural default will invariably lead to dismissal of action - Prejudice - Whether to consider if other party prejudiced by default - Whether prejudice a crucial and decisive factor.*

CIVIL PROCEDURE: *Appeal - Appeal from Registrar - Fresh evidence, adduction of - Rules of the High Court 1980, O. 56 r. 1(3A)(a) and (b) - Whether must be read together.*

CIVIL PROCEDURE: *Appeal - Fresh evidence, adduction of - General rule - Whether appellate Court will allow - Allegation of negligence against former Counsel - Whether a ground for allowing admission of fresh evidence.*

CIVIL PROCEDURE: *Affidavits - Affidavit in reply - Application for extension of time to file fresh affidavit in reply - Whether fresh evidence can be admitted.*

CIVIL PROCEDURE: *Summary judgment - Requirements in O. 14 of Rules of the High Court 1980 - Whether satisfied - Whether defendant has raised triable issue.*

LAND LAW: *Indefeasibility of title and interests - National Land Code 1965, s. 340 - Land Enactment No 1.*

The plaintiff had earlier filed and served a writ and a statement of claim in which it sought vacant possession in respect of a piece of land ('the said land') in Johor Bahru which was being occupied by the defendant.

Subsequently, the plaintiff filed a summons-in-chambers praying for summary judgment under O. 14 of the Rules of the High Court 1980 ('the RHC') for vacant possession of the said land together with general damages, interest, and costs. At the hearing, both the defendant and his Counsel were absent, and the Senior Assistant Registrar ('the SAR') gave judgement to the plaintiff and fixed a date for the assessment of damages.

Jolted, Counsel for the defendant then filed a summons-in-chambers to set aside the order of the SAR. The SAR allowed the defendant's application and set a new date for hearing the plaintiff's application for summary judgment. After hearing the parties, the SAR allowed the plaintiff's application for summary judgment with a consequential order that a date would be fixed for the assessment of general damages.

Aggrieved, the defendant filed a notice of appeal to the Judge-in-Chambers. At the hearing of the defendant's appeal, the defendant applied for an adjournment to file an application for extension of time to file a fresh affidavit in reply. The adjournment was granted with costs given to the plaintiff. The defendant submitted that the fresh evidence sought to be admitted was crucial and would make a huge difference to his position. It was also the defendant's contention that the plaintiff's title to the said land was defeasible by virtue of s. 340(2)(b) of the National Land Code 1965 ('the NLC'). The defendant contended that he had purchased the said land from one Syed Abdul Rahman and was, thus, the rightful owner of the said land.

The main issues that arose for decision were: (i) whether the defendant should be granted an extension of time to file a fresh affidavit in reply; (ii) whether fresh evidence could be admitted; (iii) whether the plaintiff is the legal proprietor of the said land; (iv) whether the requirements for granting summary judgment had been fulfilled; and (v) whether the defendant had raised a triable issue.

Held:

[1] In practice, an application to extend time is generally allowed provided no injustice is caused and the other party can be compensated by costs. However, there must always be cogent material to satisfactorily explain the delay before the Court will exercise its discretion to extend time.

[2] The rules of Court and the associated rules of practice, devised by the Rules Committee and developed by the Courts over the years to promote the expeditious despatch of litigation, must be observed. However, if these rules are too rigidly and vigorously enforced, then procedural defaults would lead to the dismissal of actions without any consideration as to whether the default of one party has prejudiced the other. The Court treats the existence of such prejudice as a crucial, and often decisive, matter.

[2b] A plaintiff should not, in the ordinary way, be denied an adjudication of his claim on the merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate. However, if this principle is rigidly followed without exception, then a wealthy plaintiff, willing and able to meet orders for costs, could flout the rules with impunity.

[3] Order 56 r. 1(3A)(a) and (b) of the RHC must be read together, not separately. The general rule has all along been that where a party calls no evidence in the Court below, then an appellate Court will certainly not allow him to adduce fresh evidence. In the instant appeal, the defendant should not, based on the scanty material in his affidavit, be allowed to introduce fresh evidence at this point in time; the alleged negligence of the defendant's former Counsel was not a ground to allow fresh evidence to be admitted at this late stage of the proceedings.

[4] The particulars of the purported sale of the said land to the defendant by Syed Abdul Rahman were not recorded by the relevant land authority in the register of title. And since there was no instrument of transfer, those portions of the said land were not capable of being transferred, and any attempt to transfer those portions shall be null and void and of no effect within the meaning of the Land Enactment No 1.

[5] All the requirements in O. 14 of the RHC had been fulfilled and the onus was shifted onto the defendant to satisfy the Court as to why judgment should not be given against him. On the defendant's affidavit evidence, there was nothing to show that there was a triable issue to order a trial.

[Defendant's application for extension of time to file fresh affidavit in reply denied. Defendant's appeal dismissed]

Cases referred to:

Eaton v. Storer [1882] Ch. D 91 CA Vol. xxii ***(dist)***
Atwood v. Chichester [1878] QBD Vol. III 727 ***(dist)***
Costellow v. Somerset County Council [1993] 1 All ER 952 CA ***(dist)***
Thamboo Ratnam v. Thamboo Cumarasamy and Cumarasamy Ariamany d/o Kumarasa [1965] 1 WLR 8 ***(cit)***
Lloyd Triestina Societa v. Chocolate Products (M) Sdn. Bhd. [1978] 2 MLJ 27 FC ***(cit)***
Ong Guan Teck & Ors. v. Hijjas [1982] 1 MLJ 105 ***(refd)***
Lim Hee Chuan v. Toh Phaik Har [1949] MLJ 92 ***(cit)***
Shaik Salhield bin Abdullah Bajarie v. Mootoo Carpen Chitty [1910] 2 MC 16 ***(cit)***
Chai Yen v. Bank of America National Trust and Savings Association [1980] 2 MLJ 142 ***(refd)***
Lye Thai Sang & Anor. v. Faber Merlin (M) Sdn. Bhd. & Ors. [1986] 1 MLJ 166 ***(refd)***
Cohen v. Bayley Worthington and Another [1908] AC 97 HL (E) ***(dist)***
Re Smith (Eastick v. Smith) [1904] Ch. D 139 ***(dist)***
Munah v. Fatimah [1968] 1 MLJ 54 ***(dist)***
Abdul Razak bin Ahmad v. Majlis Bandaraya Johor Bahru [1995] 4 CLJ 339 ***(cit)***
National Company For Foreign Trade v. Kayu Raya Sdn. Bhd. [1984] 2 MLJ 300 FC ***(foll)***
Bank Negara Malaysia v. Mohd. Ismail & Ors. [1992] 1 MLJ 400 ***(refd)***
Citibank N.A. v. Ooi Boon Leong and Ors. [1981] 1 MLJ 282 ***(refd)***

Legislation referred to:
Fines and Recoveries Act 1833 [UK]
Land Enactment No 1, ss. 26A, 62, 63, 64, 65, 66
National Land Code 1965, s. 340(2)(b)
Rules of the High Court 1980, O. 3 r. 5(1), O. 14, O. 19 r. 1, O. 24 r. 16(1), O. 25 r. 1(4), O. 28 r. 10(1), O. 34 r. 2(2), O. 56 r. 3A(a), (b)

For the plaintiff - Ng Chew Hor; M/s. Leng & Co.
For the defendant - Sanjay Mohanasundaram; M/s. Skrine & Co.

JUDGMENT

Abdul Malik Ishak J:

From the Court file, the following details were pieced together. On 24 December 1994, the plaintiff filed their writ enclosing therein the statement of claim (encl. 2) wherein the plaintiff sought vacant possession of a portion of a piece of land held under Grant No: 26977, Lot No: 4271, Bandar Baru, Johor Bahru ('the said land') which was occupied by the defendant together with general damages, interest and costs. An affidavit of service in encl. 4 showed that the writ and the statement of claim had been duly posted to the defendant by way of an A.R. registered letter on 23 January 1995. A memorandum of appearance in encl. 6 dated 18 January 1995 was filed by T/n. Yacob & Rakan-Rakan for the defendant. On 21 March 1995, M/s. Leng & Co. for the plaintiff filed a "perakuan segera" in encl. 8 to expedite the hearing of a summons-in-chambers that was filed on the same day as reflected in encl. 10 and, briefly, that summons-in-chambers sought summary judgment under O. 14 of the Rules of the High Court, 1980 ('RHC') for vacant possession of the said land together with general damages, interest and costs. Enclosure 10 was supported by an affidavit of Wong Chan Thong affirmed on 21 March 1995 (encl. 9) which was also filed on 21 March 1995. The defendant changed his solicitors on 7 April 1995 (encl. 13) wherein T/n. A. Singh took over the affairs of the defendant. Enclosure 13 was filed on 12 April 1995. On 22 May 1995, encl. 10 came up for hearing before the Senior Assistant Registrar ('SAR') and the record shows that Mr. Ng Chew Hor appeared for the plaintiff while Mr. Awtar Singh appeared for the defendant. The SAR did not proceed with the hearing of encl. 10 as Mr. Awtar Singh applied for an adjournment to file an affidavit in reply; consequently, the next date for hearing was fixed on 20 June 1995. Come 20 June 1995, the SAR was all ready to hear encl. 10 and it transpired that only Mr. Ng Chew Hor attended Court on that day. Mr. Awtar Singh was not present and neither was the defendant and, consequently, the SAR gave an order in terms of the prayers in Encl. 10 and fixed 17 October 1995 for assessment of damages. Mr. Awtar Singh must have been jolted to reality and he quickly filed an application by way of a summons-in-chambers in encl. 18 to set aside the order of the SAR dated 20 June 1995. In support of encl. 18, Mr. Awtar Singh affirmed an affidavit dated 23 June 1995 in encl. 17 wherein he explained his

absence on 20 June 1995. Enclosure 18 was duly heard by the SAR on 14 August 1995. This time Mr. Awtar Singh appeared for the defendant; in attendance too was Mr. Ng Chew Hor who acted for the plaintiff. Mr. Ng Chew Hor was magnanimous enough to concede to Encl. 18 and the SAR forthwith gave judgment in terms of the prayers in encl. 18. A new date for the hearing of encl. 10 was fixed and this was on 4 October 1995. In due course, an order to that effect was extracted as reflected in Encl. 25.

It was only on 18 October 1995 that Mr. Awtar Singh filed an affidavit in reply (encl. 27) in response to the affidavit of Wong Chan Thong in Encl. 9. It is pertinent to point out that though Mr. Awtar Singh affirmed that affidavit in reply in encl. 27 yet there was no indication as to when he affirmed it. Be that as it may, it is safe to say that Mr. Awtar Singh had received instructions from the defendant before encl. 27 was filed. On 4 October 1995 when encl. 10 was scheduled to be heard before the SAR, Mr. Awtar Singh sought for an adjournment, and it was readily granted by the SAR who then fixed 19 October 1995 as the next date for hearing. On 19 October 1995, the SAR heard arguments by both parties in regard to encls. 10, 9 and 27 and adjourned the matter for decision on 30 October 1995 when the SAR finally gave judgment to the plaintiff in regard to encl. 10 with a consequential order that a date would be fixed for assessment of general damages.

Aggrieved by the decision of the SAR, Mr. Awtar Singh duly filed a notice of appeal to the Judge-in-Chambers dated 3 November 1995 as per encl. 29. The hearing of encl. 29 was fixed before me on 27 December 1995 and on that date Mr. Awtar Singh applied for an adjournment as the Court was told that the defendant has retained M/s. Skrine & Co. to act for him. Since Mr. Ng Chew Hor did not put up any protest, this Court adjourned the matter to 19 January 1996. Unfortunately, when the matter came up for hearing on 19 January 1996, Mr. Ng Chew Hor who acted for the plaintiff, also mentioned on behalf of M/s. Skrine & Co. who acted for the defendant and this Court was told that M/s. Skrine & Co. requested for an adjournment as they were still awaiting for some documents from Mr. Awtar Singh. A new hearing date for encl. 29 was given and this was on 7 February 1996. On that date Mr. Sanjay Mohanasundaram ('Mr. Sanjay') appeared for the defendant and he sought for an adjournment of the hearing of encl. 29 as he wanted to file a fresh affidavit in encl. 9. Why must Mr. Sanjay adopt this stand? It is apparent that Mr. Sanjay was trying to buy time so that he could prepare a fresh affidavit in reply in rebuttal of encl. 9 for he must have felt that the affidavit in reply in encl. 27 filed by Awtar Singh was insufficient. It is Mr. Sanjay's legal manoeuvring to have the fresh affidavit in reply in rebuttal of encl. 9 to be considered by this Court when the appeal in encl. 29 was set down for hearing. It is thus not surprising that Mr. Ng Chew Hor strenuously objected to the adjournment and sought for costs if this Court was minded to grant the adjournment. I decided to grant the adjournment and gave costs to the plaintiff. The adjournment was to enable Mr. Sanjay to file his application

for an extension of time to file a fresh affidavit in reply to encl. 9 and the adjournment date was on 13 February 1996. On that date, this Court heard the submissions of both parties in regard to encl. 36 which was supported by an affidavit affirmed by Mr. Sanjay on 6 February 1996 as reflected in encl. 35. Three prayers were sought for in encl. 36 and for convenience they are reproduced hereinunder:

(i) Menurut A. 3 k. 5 Kaedah-kaedah Mahkamah Tinggi 1980 bahawa jangkamasa untuk mengfailkan dan menyerahkan affidavit jawapan Seok Kim Leow sebagai membantah saman dalam kamar bertarikh 21 Mac 1995 (this must be encl. 9) dan affidavit Wong Chan Thong yang diikrarkan pada 21 Mac 1995 (this must be encl. 9) dilanjutkan selama dua minggu dari tarikh perintah ini atau masa lain yang sebagaimana Mahkamah mulia ini sifatkan adil dan berpatutan;

(ii) Bahawa defendan hendak diberi kebebasan untuk merujuk kepada affidavit Seok Kim Leow tersebut yang akan difailkan di Mahkamah ini ketika perbicaraan saman dalam kamar plaintif bertarikh 21 Mac 1995;

(iii) Bahawa kos bagi permohonan ini hendaklah menjadi kos dalam kausa dan perintah dan relief yang lain yang Mahkamah yang mulia ini anggap sesuai.

I have earlier on set out *in extenso* the facts that led to the filing of encl. 36. Needless to say the facts were rather chequered and Mr. Sanjay was quite blunt when he said that Mr. Awtar Singh was negligent. Indeed from 7 April 1995 to 20 June 1995, Mr. Awtar Singh was in deep slumber and he was only awakened when he realised that the SAR had granted the prayers in encl. 10. It took Mr. Awtar Singh 6 months 11 days to file his affidavit in reply in encl. 27 calculated from 7 April 1995 to 18 October 1995. Mr. Sanjay submitted with fervour that it was not his mistake that he was now compelled to file encl. 36. The fresh evidence that was sought to be admitted was said to be crucial and would make a huge difference to the position of the defendant.

It is germane to take stock of the positions of the parties in regard to encls. 10 and 9. The SAR heard encls. 10 and 9 on 19 October 1995 and after hearing the submissions of both Mr. Ng Chew Hor and Mr. Awtar Singh, the SAR reserved judgment till 30 October 1995 where he gave judgment in favour of the plaintiff. Now, when the SAR heard encls. 10 and 9, he had before him encl. 27 that was affirmed by Mr. Awtar Singh. Surely what was deposed to in encl. 27 by Mr. Awtar Singh must have been on the instructions of the defendant and that being the case why must the defendant now say through Mr. Sanjay that insufficient material was placed before the SAR on 19 October 1995.

In *Eaton v. Storer* [1882] Ch. D 91 CA Vol. xxii it was argued that the delay in filing so simple a pleading as a mere joinder of issue after the time had been twice enlarged was said to be inexcusable, and no explanation of

the delay being given, the appeal ought to be dismissed, especially as the application was not made till after the defendant had given notice of motion for judgment. The Court of Appeal held the view that the plaintiff's application should be allowed and the costs therein should be incurred by the plaintiff. This was how Jessel MR put it on behalf of his fellow brothers (Cotton LJ and Sir James Hannen):

> According to the usual practice of the Court the plaintiff's application ought to have been granted by the Vice-Chancellor. The plaintiff was out of time, and in that case if a motion is made for judgment on admissions in the pleadings, or if the analogous step is taken of a motion to dismiss for want of prosecution, the usual course is to give the plaintiff time to take the next step upon his paying costs; which is a sufficient punishment, and will prevent the rules from becoming a dead letter. This course will not be departed from unless there is some special circumstance such as excessive delay. In the present case there was no extraordinary delay, the original time for delivering reply not having expired till t 25 July. The application ought to have been granted on the terms of the plaintiff paying the costs of it. Our order now will be that the delivery of reply on 28 October shall stand, the plaintiff paying the costs of the application to the Vice-Chancellor, but having his costs of the appeal.

Relying on *Eaton v. Storer (supra),* Mr. Sanjay argued that his application ought to be granted by this Court as the necessary costs should be ordered in favour of the plaintiff. On the facts, however, *Eaton v. Storer (supra)* could easily be distinguished. There the facts were not in regard to adducing further evidence like the case presently before me. There it involved an enlargement of time to file a reply to the statement of defence. There, unlike here, there was no allegation of the negligence of Counsel that conducted the matter.

Again it was argued that no matter how late an application by an applicant may be, any injury caused by such a delay may be compensated by the payment of costs. By way of an analogy the case of *Atwood v. Chichester* [1878] QBD Vol. III at p. 727 was referred to. Briefly the facts in that case were that the defendant, a married woman having a separate estate without power of anticipation, signed at the request of her husband a cheque, and also a bill of exchange. Her husband negotiated these documents with the plaintiff for a valuable consideration. The amount thereof remaining unpaid, the writ of summons in the present action was issued and served upon the defendant; she handed it to her husband who promised to attend to it. No appearance having been entered, judgment was signed on 19 October 1876; a summons taken out to set aside the judgment was dismissed on 30 July 1877, by a master. Field J, on 3 August made an order that the defendant should pay the debt by instalments. A summons was taken out on 9 November, to commit the defendant for non-payment of the instalments, and on 26 November, a summons to set aside the judgment in the action was dismissed by Pollock B. The defendant appealed on 21 December to the Queen's Bench Division, which refused to interfere. The defendant appealed to the Court of Appeal.

In a separate judgment, Bramwell LJ had this to say:

> It is clear that if the defendant had made an early application to set aside the judgment, she would have been allowed to defend upon proof that her conduct has been *bona fide*. Her defence is not technical, nor does it resemble an objection that an action has been brought too soon: the defence is meritorious and substantial. By the law of this country a married woman cannot bind herself except by binding her separate property – she cannot bind herself personally. It is plain that a mere omission to enter an appearance within due time would not have been a bar to an early application. But it has been argued that the defendant is now too late. When sitting at Chambers I have often heard it argued that when irreparable mischief would be done by acceding to a tardy application, it being a departure from the ordinary practice, the person who has failed to act within the proper time ought to be the sufferer, but that in other cases the objection of lateness ought not to be listened to, and any injury caused by the delay may be compensated for by the payment of costs. This I think is a correct view. Here the action in its present form is not maintainable, and it must be taken that when the plaintiff issued the writ, he knew that he could not succeed: what harm will it be done to the plaintiff by allowing the defendant to appear? The objection of lateness ought not to be allowed to prevail. But then has her conduct been *bona fide*? Has she acted merely with want of care and through ignorance, or did she really intend to suffer judgment and make herself liable upon the documents which she had signed? Upon the facts I come to the conclusion that the defendant did not intend to make herself liable in this action: she has not acted *mala fide*, but she has a good and meritorious defence, and the plaintiff must have known that he could not succeed. With all respect to the Queen's Bench Division, I agree with the decision.

Brett LJ, and Cotton LJ, in separate judgments concurred with the decision of Bramwell LJ. Obviously, the facts in *Atwood v. Chichester (supra)* are poles apart from the facts of the present case. In the former, the action was misconceived in that the defendant was a married woman, and cannot render herself personally liable. At law, a plea of coverture was a good defence to any action against a married woman upon any contract entered into by her; and in equity there could not be a decree against her personally. That was the position of the law in England. Here before me there was no plea of coverture as it was not a case of a husband and wife relationship. Here was an attempt to introduce fresh evidence after the SAR had disposed of encls. 10, 9 and 27 on account of the negligence of a solicitor. On the facts, *Atwood v. Chichester (supra)* would be of no help to the defendant.

Next, the recent Court of Appeal case of *Costellow v. Somerset County Council* [1993] 1 All ER 952 CA where the headnote reads as follows:

> On 15 September 1987 the plaintiff suffered personal injuries when he slipped on loose gravel thrown onto a pavement during road resurfacing works. He consulted solicitors but no claim was intimated to the defendant highway authority until a letter before action dated 13 September 1990. The following day a writ was issued, just within the three-year limitation period, against the defendants

claiming damages for personal injuries but it was not served on the defendants until 11 January 1991, just within the four-month period allowed for service. On 24 May 1991, by which time no statement of claim had been served despite repeated reminders and threats to apply for the action to be dismissed, the defendants issued a summons to dismiss the plaintiff's action for failure to comply with RSC O. 18 r. 1 by serving a statement of claim, failure to serve a medical report or schedule of loss in breach of RSC O. 18 r. 12(4)(a) or for want of prosecution. The district Judge made the order sought and his decision was affirmed on appeal by the Judge, who also dismissed an application by the plaintiff for leave to serve the statement of claim out of time on the ground that the plaintiff had not shown good reason for the delay. The plaintiff appealed, contending that the delay complained of after the issue of proceedings had caused no prejudice or serious risk of prejudice to the defendant, that although it was inexcusable it was not inordinate and that therefore the action should be allowed to proceed. Held – In the ordinary way and in the absence of special circumstances, such as procedural abuse, questionable tactics, contumelious and intentional default or where a default was repeated or persisted in after a peremptory order, the Court should not exercise its inherent jurisdiction to dismiss a plaintiff's action for want of prosecution unless the delay complained of after the issue of the proceedings had caused at least a real risk of prejudice to the defendant. A similar approach should govern applications to dismiss on failure to comply with a time limit under O. 19, 24, 25, 28 and 34. Furthermore, the approach to applications to extend the time limit under O. 3 r. 5 should in most cases not be very different and save in special cases or exceptional circumstances it would rarely be appropriate to refuse the plaintiff an extension because of a procedural fault where the overall justice of the case required that the action be allowed to proceed. Although the plaintiff's case was not very strong there was no ground for dismissing the action for want of prosecution in the absence of prejudice to the defendants. The appeal would therefore be allowed and the plaintiff's application for an extension of time in which to serve the statement of claim would be granted.

By way of *per curiam*, Sir Thomas Bingham MR who delivered the judgment of the Court of Appeal in *Costellow v. Somerset County Council (supra)* had this to say at p. 959 cols. h to j to p. 960 at col. a:

The resolution of problems such as the present cannot in my view be governed by a single universally appliable rule of thumb. A rigid, mechanistic approach is inappropriate. Where, as here, the defendant seeks to dismiss and the plaintiff seeks an extension of time, there can be no general rule that the plaintiff's application should be heard first, with dismissal of his action as an inevitable consequence if he fails to show a good reason for his procedural default. In the great mass of cases, it is appropriate for the Court to hear both summonses together, since, in considering what justice requires, the Court is concerned to do justice to both parties, the plaintiff as well as the defendant, and the case is best viewed in the round. In the present case, there was before the district Judge no application by the plaintiff for extension, although there was before the Judge. It is in my view of little or no significance whether the plaintiff makes such an application or not: if he does not, the Court considering the defendant's application to dismiss will inevitably consider the plaintiff's position and, if the

> Court refuses to dismiss, it has power to grant the plaintiff any necessary extension whether separate application is made or not.

No matter how one looks at *Costellow v. Somerset County Council (supra),* it can be of no help to the defendant here. There it was a case of the failure to serve the statement of claim within the statutory period followed by an application to dismiss the action for want of prosecution. There it was also a case of an application by the plaintiff for leave to serve the statement of claim out of time but the Judge dismissed the application on the ground that the plaintiff had not shown good reason for the delay. The approach by Sir Thomas Bingham MR was particularly commendable to the facts of the case there and it could not be used as a general proposition to extend to cases like the case presently before me. After going through some authorities, Sir Thomas Bingham MR resolved the issue that confronted him in this way:

> But in the ordinary way, and in the absence of special circumstances, a Court will not exercise its inherent jurisdiction to dismiss a plaintiff's action for want of prosecution unless the delay complained of after the issue of proceedings has caused at least a real risk of prejudice to the defendant. A similar approach should govern applications made under O. 19, 24, 25, 28 and 34. The approach to applications under O. 3 r. 5 should not in most cases be very different. Save in special cases or exceptional circumstances, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs. In short, an application under O. 3 r. 5 should ordinarily be granted where the overall justice of the case requires that the action be allowed to proceed.

Order 3 r. 5(1) of the RHC gives the Court the discretion to extend time and it states explicitly that:

> The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules or by any judgment, order or direction, to do any act in any proceedings.

In practice, an application to extend time is generally allowed provided no injustice is caused and the other party can be compensated by costs. However, there must always be before the Court cogent material to satisfactorily explain the delay before the Court will exercise its discretion to extend time: *Thamboo Ratnam v. Thamboo Cumarasamy and Cumarasamy Ariamany d/o Kumarasa* [1965] 1 WLR 8. Thus, when an applicant failed to advance any reason as to why the writ was not served during the period of its validity, the Court would not readily exercise its discretion in favour of extending time to renew the writ: *Lloyd Triestina Societa v. Chocolate Products (M) Sdn. Bhd.* [1978] 2 MLJ 27 FC. From the authorities both foreign and local, two distinct principles can be garnered. The first principle is the time honoured principle that the rules of Court and the associated rules of practice, devised

by the Rules Committee and developed by the Courts over the years to promote the expeditious despatch of litigation must be rigidly observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but rather requirements set which should be met rigidly by the parties thereto. This time honoured principle is reflected in a series of rules giving the Court a discretion to dismiss on failure to comply with a time limit. Thus, O. 19 r. 1 of the RHC (default in service of statement of claim), O. 24 r. 16(1) of the RHC (failure to comply with requirement for discovery etc), O. 25 r. 1(4) of the RHC (failure of plaintiff to take out summons for directions, then the defendant may apply to dismiss the action), O. 28 r. 10(1) of the RHC (failure to prosecute proceedings with despatch), and O. 34 r. 2(2) of the RHC (failure of the plaintiff to set down action for trial, the defendant may set down the action for trial or may apply to the Court to dismiss the action for want of prosecution) are some examples set by the Rules Committee. This principle is also reflected in the Court's inherent jurisdiction to dismiss for want of prosecution.

The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate. This principle is clearly reflected in the general discretion to extend time conferred by O. 3 r. 5(1) of the RHC as reproduced earlier on, and this discretion is to be exercised in accordance with the requirements of justice in the particular case. Broadly stated this principle is also reflected in the liberal approach generally adopted in relation to the amendment of pleadings.

In *Ong Guan Teck & Ors. v. Hijjas* [1982] 1 MLJ 105, Hashim Yeop A. Sani J (as his Lordship then was) observed:

> The Court has an unfettered discretion to grant or refuse an extension of time. The rules of Court must *prima facie* be obeyed and in order to justify an extension of time, there must be some material on which the Court can exercise its discretion in favour of the applicant. For otherwise the party in breach of the rules would have an unfettered right to extension of time which would defeat the very purpose and object of the rules of limitation of period. In considering whether to grant or refuse extension of time the length of time that has lapsed is always a material factor to be considered by the Court exercising the discretion. On the facts of the present case there was not any valid ground for the delay and therefore application for extension of time must be refused.

In my judgment, these two principles expounded earlier are not absolute. If the first principle were rigidly and vigorously enforced, procedural default would lead to dismissal of actions without any consideration of whether the plaintiff's default had caused prejudice to the defendant. But the Court's approach and practice has been and it will continue to be so in that it would treat the existence of such prejudice as a crucial, and often a decisive matter. On the other hand, if the second principle were followed rigidly without exception, a

wealthy plaintiff willing and able to meet orders for costs made against him could flout the rules with impunity, confident that he would not suffer any penalty until and unless the defendant could demonstrate the presence of prejudice. And if this happens it would certainly circumscribe the very general discretion conferred by O. 3 r. 5 of the RHC; indeed it would involve a substantial rewriting of the rule to the dislike of the Rules Committee.

Adducing fresh evidence in an appeal from the decision of the SAR to a Judge-in-Chambers is governed by O. 56 of the RHC – in particular r. (3A) thereof which was introduced *vide* P.U.(A) 192/93 and for convenience it is reproduced as follows:

> (3A) At the hearing of the appeal fresh evidence shall not be admitted unless the Judge is satisfied that –
>
> (a) at the hearing before the Registrar the new evidence was not available to the party seeking it, or that reasonable diligence would not have made it so available, and
>
> (b) the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the registrar.

The affidavit of Mr. Sanjay in encl. 35 in support of the application to introduce fresh evidence made general references to, firstly, the failure of Mr. Awtar Singh to reply to all the issues that were raised in encl. 9 when encl. 27 was prepared and, secondly, that there were certain documents that would show that the defendant had purchased the said land and, consequently, the rightful owner to the said land. But unfortunately these documents were not enclosed as exhibits to encl. 35 and this Court was left guessing as to whether those documents, if true, would have had or would have been likely to have had a determining influence upon the decision of the SAR. There was no averment in encl. 35 to say that the new evidence was not available to the defendant when the hearing was heard before the SAR nor was there any averment that reasonable diligence would not have made it available. At the end of the day, what has to be resolved is the question whether this Court is satisfied that r. 3A(a) and r. 3A(b) of O. 56 of the RHC has been fulfilled. In ordinary usage the use of the word "and" is conjunctive and that being the case both (a) and (b) of r. 3A O. 56 of the RHC must be read together and not separately. The general rule has all along been that where a party had called no evidence in the Court below, the appellate Court would certainly not allow him and would bar him from adducing fresh evidence. Must this Court give the defendant a second chance to adduce fresh evidence which must surely be in his possession when encl. 27 was filed by Mr. Awtar Singh? As the law presently stands this Court would be reluctant to give that second chance to the defendant: *Lim Hee Chuan v. Toh Phaik Har* [1949] MLJ 92; *Shaik Salhield bin Abdullah Bajarie v. Mootoo Carpen Chitty* [1910] 2 MC 16. One must no lose sight of the fact that the then Federal Court had in the

case of *Chai Yen v. Bank of America National Trust and Savings Association* [1980] 2 MLJ 142 outrightly refused an application to introduce fresh evidence on the grounds that the applicant had not shown that the evidence could not have been obtained with reasonable diligence by the applicant for use at the trial and that the document in question had no relevance whatsoever. The then Supreme Court in *Lye Thai Sang & Anor v. Faber Merlin (M) Sdn. Bhd. & Ors.* [1986] 1 MLJ 166 in strong words held that it had no power to reopen, rehear and re-examine its decision for whatever purpose except as stated by the Courts of Judicature Act, 1964. In my judgment applying these authorities the defendant should not, based on scanty material in encl. 35, be allowed to introduce fresh evidence at this point of time. The negligence of Mr. Awtar Singh as adverted to by Mr. Sanjay is not a ground to allow fresh evidence to be admitted at this late stage of the proceedings and I so hold accordingly. This meant that encl. 36 must be dismissed with costs. A consequential order was also made to the effect that the costs be assessed and paid to the plaintiff by the defendant.

On 28 February 1996, the appeal to the Judge-in-Chambers in encl. 29 against the decision of the SAR wherein summary judgment in favour of the plaintiff for vacant possession of the said land which was occupied by the defendant together with general damages, interest and costs which was scheduled for hearing before me was adjourned to 1 March 1996 as Mr. Sanjay forgot to bring the relevant file. Finally, when encl. 29 was heard it was dismissed with costs. I shall now proceed to set out the submissions of both parties and my reasons for dismissing encl. 29.

Briefly, Mr. Sanjay questioned the plaintiff's legal proprietorship of the said land on the ground that the registration was obtained by means of an insufficient or void instrument under s. 340(2)(b) of the National Land Code 1965 ('NLC'). Put differently there was a challenge to the indefeasible title of the plaintiff to the said land. Mr. Sanjay cited some authorities and it is germane that I should, at this juncture, examine them.

In *Cohen v. Bayley Worthington and Another* [1908] AC 97 HL (E), where the facts were that a testator, by a will made in 1851, settled real estates in strict entail, and appointed three protectors of the settlement under the Fines and Recoveries Act 1833, with power in the event of vacancies to appoint new protectors, "to the intent that the full member of three persons should from time to time fill the office." Two of the protectors died, and their vacancies were not filled up. The surviving protector exercised the office of protector, and consented to a disentailing assurance barring the entail. The estates having been sold, and the purchaser having objected to the title, Neville J held that good title had not been shown, being of opinion that the settler had expressed the intention that the office of the protector should be exercised by three persons only. This decision was reversed by the Court of Appeal comprising Cozens-Hardy MR, Fletcher Moulton and Farwell LJJ and

hence the appeal came up before the House of Lords which held that, since, upon the true construction of the settlement, it was not clear that the settlor intended to exclude survivorship, the surviving protector had power to exercise the office and to give a good title. Lord Loreburn LC in a short judgment had this to say (at p. 99 of the report):

> My Lords, if the question of law which arises in this case were open for our consideration, while I should be inclined to agree in the view expressed by Malins V-C, I would certainly ask that it should be argued on the other side. But the fact is that 35 years ago Malins V-C did decide that where two persons were appointed protector, with no provision for appointing successors and no reference to survivorship, the consent of the survivor enabled the tenant in tail to bar the entail.
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> Now I am not prepared to depart from a rule laid down so long ago which has never since been questioned, and upon the faith of which I know not how many titles may rest.
>
> Is there anything in the will to forbid the rule being acted upon in the present case? I can find nothing beyond this, that power is given to fill up the number of the group constituting the protector to three and a desire that it shall be so. To my mind that is not sufficient. If survivorship was to be excluded it ought to have been done with sufficient clearness. I think it has not been done with sufficient clearness, and therefore this appeal must be dismissed.

In a concurring judgment, Lord Macnaghten said:

> My Lords, I am of the same opinion. I agree with the judgment of Cozens-Hardy MR, and I desire to adopt it with one slight reservation as to what is said about the last *proviso* to s. 2. The Master of the Rolls says that in his opinion that *proviso* 'applies whether the tenant for life is or is not included in the persons appointed protectors.' It seems to me that it only applies when the tenant for life, or the person who is described as the natural protector, is included in that body. I think the *proviso* is introduced *ex abundanti cautela.* When the natural protector himself is made one of a body intended to displace and exclude the natural protector and when that body is reduced to one, and that one is the natural protector, it might have been open to argument, in the absence of such a *proviso*, that he ought to act alone.

In *Re Smith (Eastick v. Smith)* [1904] Ch. D 139 where the headnote reads as follows:

> A testator appointed his wife M, his brother C, and his friend R executors and trustees of his will, and gave to "my said trustees" all his estate upon trust for his wife for life, "with power to my said trustees" to sell the whole or any part of his estate and apply the proceeds for the benefit of his wife during her life.
>
> Held, that the power was not personal to the trustee originally named, but was annexed to the office and could be exercised by the trustees or trustee for the time being.

The general principle laid down by the Master of the Rolls (Sir W. Grant) in *Cole v. Wade* [1807] 16 Ves. 27, 44; 10 RR 129, 135, that 'wherever a power is of a kind, that indicates a personal confidence, it must *prima facie*, be understood to be confined to the individual, to whom it is given; and will not except by express words pass to others, to whom by legal transmission the same character may happen to belong,' dissented from as being inconsistent with the principle of the decision of the Court of Appeal in *Crawford v. Forshaw* [1891] 2 Ch. 261.

In *Munah v. Fatimah* [1968] 1 MLJ 54, the facts and the decision of the Court can be gleaned from the headnote which reads as follows:

The plaintiff in 1946 entered into an agreement with the defendant and her brother, who were the beneficiaries to the estate of one Hamat, to purchase a piece of padi land, which was registered in the name of the deceased, for a consideration of $500. She went into occupation of the said land and cultivated it with padi and had since reaped the economic crops and enjoyed possession and profit without hindrance from the beneficiaries for a period of 19 years. She had also paid the annual quit rents for the land. She had repeatedly asked the beneficiaries to take out letters of administration in respect of the deceased's estate so that they could transfer the said land to her, but they did nothing. After unsuccessful attempts by the plaintiffs to get the land transferred to her, she instituted these proceedings claiming *inter alia*, that the land in question be transmitted and registered in her name.

Held: (1) as from the time the plaintiff went into occupation she was the equitable owner of the said land. What was required now was to clothe the equitable estate with a legal title. She was therefore entitled to the relief claimed.

(2) in this case time did not run against the plaintiff as it was not that species of laches which would prevail against the equitable title.

On the authorities of *Cohen v. Bayley Worthington and Another (supra)* and in *Re Smith (Eastick v. Smith) (supra)*, arguments were advanced to the effect that the trust instrument that gave the trustees the power to sell the said land to the plaintiff was not exhibited and, consequently, it went to the crux of the matter in that there might have been an insufficient or void instrument to effect the transfer of the said land to the plaintiff. Indeed this was a novel point that was not ventilated in encl. 27. Moreover, what was adverted to in encl. 9 especially that part which said that the plaintiff was currently the registered proprietor of the said land was never challenged by the defendant in encl. 27 and, consequently, it must be held to be acceptable by the defendant (*Abdul Razak bin Ahmad v. Majlis Bandaraya Johor Bahru* [1995] 4 CLJ 339). Two agreements dated 31 December 1951 and 2 January 1952 were exhibited in encl. 27 as "AS1" to show that the said land was purchased by the defendant from Syed Abdul Rahman bin Hassan Alattas and it was purportedly done to show that the defendant had a right over the said land. But alas s. 26A of the Land Enactment No: 1 which came into force on 30 April 1941 enacts that:

> An undivided share in land may be transferred, transmitted, devised or charged, but no area not being the whole area of the land comprised in any document of title shall be transferred or charged until the land shall have been divided by survey and fresh documents of title registered.

and, it clearly prevents a transfer of a part of land comprised in any document of title until a fresh document of title is issued. This impediment would clearly render the two agreements in Exh. "AS1" as a mere piece of document without any legal effect whatsoever. It is beyond peradventure that the plaintiff was the legal registered proprietor of the said land since 21 January 1994. The said land was previously known as C.T. 2264 and before that as Malay Grant 1572. By a Court order dated 22 January 1949 *vide* Civil Suit No: 20 of 1937, the said land was vested in the Estate and Trust Agencies (1927) Limited as trustees for the estate of Syed Hassan bin Ahmad Alattas. The endorsement of the memorial of the vesting order as ordered by the Court was made on the register document of title to the said land on 14 May 1949 as reflected in the Malay Grant 1572. This meant that the registered proprietor of the said land as from 14 May 1949 was the Estate and Trust Agencies (1927) Limited as trustees for the estate of Syed Hassan bin Ahmad Alattas. The Estate and Trust Agencies (1927) Limited remained the registered proprietor of the said land until 13 January 1981, and thereafter the said land was transferred to the following four persons as trustees of the estate of Syed Hassan bin Ahmad Alattas:

(i) Syed Mohamed bin Idrous Alattas;

(ii) Dato' Ungku Mohsin bin Mohamed;

(iii) Syed Ali bin Mohamed Alattas; and

(iv) Syed Hussein bin Salim Alattas.

On 6 May 1981, the said land was again transferred and registered to the following four (4) persons and they held the said land as trustees of the estate of Syed Hassan bin Ahmad Alattas:

(i) Syed Hussein bin Salim Alattas;

(ii) Syed Salleh bin Abdul Rahman Alattas;

(iii) Syed Abdul Kadir bin Mohd Alattas; and

(iv) Syed Mohd Zain Alattas.

It must be remembered that at no point of time was the said land sub-divided or transferred to any of the beneficiaries of the estate of Syed Hassan bin Ahmad Alattas. Naturally, as the owner of the said land, the plaintiff was keen to develop it but was prevented by the presence of several houses on the said land which were occupied by individuals whose presence there were without the permission nor agreement of the plaintiff and, among them, of

course, was the recalcitrant defendant. Notices of demand dated 26 May 1994, 11 July 1994 and advertisements in the local newspapers dated 3 August 1994, 4 August 1994 and 6 August 1994 were issued and effected respectively by M/s. Leng & Co. on behalf of the plaintiff to those persons who were in occupation of the houses built on the said land. These notices of demand and the advertisements relate to the same messages in that it demanded vacant possessions from those persons. Unfortunately these people, including the present defendant, refused to vacate and demolish the houses built on the said land. On these set of facts, the plaintiff applied in encl. 10 for summary judgment against the defendant and for vacant possession of the said land together with interest and costs. Reverting back to the two agreements purportedly entered between the defendant and Syed Abdul Rahman bin Hassan Alattas on 31 December 1951 and 2 January 1952, certain salient observations should be put to the fore:

(1) It was not executed by the then registered proprietor of the said land namely, the Estate and Trust Agencies (1927) Limited who were the trustees of the estate of Syed Hassan bin Ahmad Alattas in 1951 and in 1952.

(2) The plaintiff purportedly purchased 4,300 square feet of land as per the agreement dated 31 December 1951 and 11,706 square feet of land as reflected in the agreement dated 2 January 1952 out of the total acreage of the said land but unfortunately there were no grants to those portions. That being the case, those portions did not come within the ambit of Part V, s. 62 of the Land Enactment No: 1 where land has been defined to mean the land comprised in a grant. There does not seem to be any provisions in the Land Enactment No: 1 for the transfer or passing of title to part only of the said land (here 4,300 square feet plus 11,706 square feet of land) comprised within a grant.

(3) Since Syed Abdul Rahman bin Hassan Alattas was not the registered proprietor of those portions which were purportedly sold to the defendant, an instrument of transfer in substantially the same form as that contained in Schedule M of s. 66(i) of the Land Enactment No: 1 was never executed by him. Bereft of the instrument of transfer, the defendant's position would be greatly weakened.

(4) The purported particulars of sale to the defendant by Syed Abdul Rahman bin Hassan Alattas were not recorded by the relevant land authority in the "Register of title" as envisaged under s. 64(i) of the Land Enactment No: 1 and, consequently, the provisions of ss. 63 and 65 of the Land Enactment No: 1 would be triggered into motion thereby rendering ineffectual passing of those portions from Syed Abdul Rahman bin Hassan Alattas under s. 65 of the Land Enactment No: 1. Furthermore, since there was no instrument of transfer following the appropriate format as reflected in Schedule M of s. 66(i) of the Land Enactment No: 1, those portions of land were not capable of being transferred and attempts to transfer those portions "shall be null and void and of no effect" within the meaning of s. 63 of the Land Enactment No: 1.

Be that as it may, even the case of *Munah v. Fatimah (supra)* can never be called in assistance to assist the defendant because the facts in that case are poles apart from the present case. There the land was registered in the name of Hamat bin Lembek who had since died leaving behind two beneficiaries. After Hamat's death, the plaintiff entered into an agreement with two of Hamat's beneficiaries who happened to be the children of Hamat for the purchase of the land for RM500. Hamat's children refused to extract the letters of administration and this prevented the land from being transferred to the plaintiff. The plaintiff sued Hamat's children. Clearly therefore in *Munah v. Fatimah (supra)*, the parties to the agreement were sued unlike the present case before me where the plaintiff who are the current registered proprietor sought to obtain vacant possession under O. 14 of the RHC. The two agreements in Exh. "AS1" of encl. 27 would not bind the plaintiff as they were not parties to the two agreements. The plaintiff too was not sued under these two agreements.

Seah FJ (as he then was) in *National Company For Foreign Trade v. Kayu Raya Sdn. Bhd.* [1984] 2 MLJ 300 FC, laid down the requirements for an O. 14 of the RHC's application in these words (p. 301):

> For the purposes of an application under O. 14 the preliminary requirements are:
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> (i) the defendant must have entered an appearance;
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> (ii) the statement of claim must have been served on the defendant; and
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> (iii) the affidavit in support of the application must comply with the requirements of r. 2 of the O. 14.

All these three requirements have been fulfilled in the present case and the *onus* was therefore shifted to the defendant to satisfy this Court why judgment should not be given against him. As Seah FJ (as he then was) said in the same case at p. 302:

> If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a *prima facie* case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the Court why judgment should not be given against him (see O. 14 rr. 3 and 4(i)).

On affidavit evidence especially the affidavit of Mr. Awtar Singh in encl. 27 there was nothing to show that there was a triable issue that would compel me to order a trial. As Mohamed Azmi SCJ (now FCJ) said in the case of *Bank Negara Malaysia v. Mohd. Ismail & Ors.* [1992] 1 MLJ 400 especially at p. 408:

> Under an O. 14 application, the duty of a Judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the Judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a Judge is in no position to exercise his discretion judicially in an O. 14 application. Thus, apart from identifying the issues of fact or law, the Court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

Indeed on the facts, this was an appropriate case for an O. 14 application. As Raja Azlan Shah CJ (Malaya) (as His Majesty then was) said in *Citibank N.A. v. Ooi Boon Leong and Ors.* [1981] 1 MLJ 282 especially at p. 284:

> That brings us to the important question whether the Assistant Registrar was entitled to deal with the case under the RSC O. 14 procedure. We have often said in this Court many a time that where all the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the Assistant Registrar or the Judge-in-Chambers, or, for that matter this Court, shall not deal with the whole matter under the RSC O. 14 procedure.

Now, the facts in *Cohen v. Bayley Worthington and Another (supra)* and in *Re Smith (Eastick v. Smith) (supra)* are obviously different from the present case and the propositions of law therein can never be universally applied to all cases and, certainly, it can never be applied to the present case. Here, even though the defendant had entered an appearance on 18 January 1995 *vide* encl. 6, yet no statement of defence has been filed by either Mr. Awtar Singh or Mr. Sanjay. In these circumstances, it is hardly surprising that Mr. Ng Chew Hor filed his application in encl. 10 which eventually came up on appeal as per encl. 29. For these reasons, encl. 29 was dismissed with costs.

Reported by Harjit Singh Pannu &
Gan Peng Chiang